IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

Nos. 81, 82

THE UNITED STATES OF AMERICA,
Appellant,

vs.

THE WAYNE PUMP COMPANY, ET AL.,
Appellees.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

THE WAYNE PUMP COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF FOR APPELLEES, GILBERT AND BARKER MANUFACTURING COMPANY AND S. C. HOPE.

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Opinion Below.

The opinion of the District Court (R. 27-43)* is reported in 44 F. Supp. 949.

* All record references to the opinion will be to the record in No. 81.

Jurisdiction.

The orders of the District Court sustaining demurrers to the indictments were entered on February 24, 1942 (No. 81, R. 43; No. 82, R. 45), and orders allowing appeal were entered on March 25 and 26, 1942 (No. 81, R. 45; No. 82, R. 47). The jurisdiction of this Court has been invoked by the Government by direct appeals under the Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended to March 26, 1942 (18 U. S. C. 682), known as the Criminal Appeals Act, and providing in part as follows:

> "An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to-wit:
>
> "From a decision or judgment • • • sustaining a demurrer to any indictment, or any count thereof, where such decision or judgment is based upon the • • • construction of the statute upon which the indictment is founded."

On April 10, 1942, appellees filed a statement in opposition to the statements as to jurisdiction filed by the United States. On May 25, 1942, this Court postponed further consideration of the question of its jurisdiction to the hearing of the cases on the merits (No. 81, R. 48; No. 82, R. 50).

Question Presented.

This brief is confined to the single question: Whether this Court has jurisdiction of these appeals under the Criminal Appeals Act, as it existed at the dates of appeal—March 25 and 26, 1942.

In our view this is the only question presented for the determination of this Court. Appellees did not question in the District Court, and do not question here, whether the activities generically alleged in the indictments are

lawful or unlawful under the Sherman Act. The indictments were challenged by demurrer (No. 81, R. 22-3; No. 82, R. 25-6) on the sole ground of their indefiniteness, ambiguity and uncertainty as a matter of criminal pleading. This ground of the demurrers of all the defendants is correctly stated in the District Court's summary of the demurrers, as follows (R. 33):

> "The demurrers challenge the sufficiency of the indictments on the ground that *they fail to describe the alleged conspiracies and combinations* with which defendants are charged so as to inform them of the nature and cause of the accusations against them and enable them to properly prepare their defenses.
>
> "The cases are before me now for disposition *on these demurrers.*" (Italics supplied.)

The Indictments.

The description of the indictments in the Government brief varies materially from the averments of the indictments themselves, and fails to reflect the District Court's interpretation, which is conclusive on the present appeals (*U. S.* v. *Borden Co.*, 308 U. S. 188, 193; *U. S.* v. *Hastings*, 296 U. S. 188, 192). We accordingly adopt, instead, the description of the indictments appearing in the brief for the appellees, The Wayne Pump Company and others.

Summary of Argument.

The indictments were challenged in the District Court on the sole ground of their indefiniteness, ambiguity and uncertainty as a matter of criminal pleading. No controverted question of the substantive law of the Sherman Act was involved in the determination of that issue, and no issue is taken here by these appellees on any question of that substantive law.

The opinion of the District Court, read in the light of the single challenge presented by the demurrers, fairly discloses that the insufficiency of the indictments as a matter of criminal pl ding was intended by the court to be, and was, the sole ground of its decision.

The presentation in the Government's brief of what was before the District Court and what it decided is inaccurate and misleading.

ARGUMENT.

MAY IT PLEASE THE COURT:

Government counsel have painted a picture of shocking offenses with respect to the use of patents and have presented their picture to this Court just as if such offenses had been adequately charged against the defendants in these indictments, and, therefore, just as if Judge Sullivan had decided that they (the offenses in question) were not offenses.

I.

The indictments were challenged in the District Court on the sole ground of their indefiniteness, ambiguity and uncertainty as a matter of criminal pleading. No controverted question of the substantive law of the Sherman Act was involved in the determination of that issue, and no issue is taken here on any question of that substantive law.

There was not involved in the lower court, and there is not involved here, any controverted question of the substantive law of the Sherman Act. Indeed, we would cheerfully agree with Government counsel as to the unlawfulness of some of their array of offenses, considered abstractly, as did Judge Sullivan. Unquestionably an indictment for such offenses would be a good and sufficient indictment *if* it made a charge of them with sufficient factual matter to individuate an offense and reasonably to inform the defendants as to what they had to meet.

These indictments were challenged on the sole ground that they are so indefinite, ambiguous and uncertain that the defendants are not informed thereby as to what charge

they would have to meet. In our view, the opinion of the lower court definitely shows that Judge Sullivan adopted the challenge of the defendants, and decided on the basis of that challenge that these indictments are bad as pleadings because of their failure to meet the fundamental requirement of the Sixth Amendment that the accused shall "be informed of the nature and cause of the accusation."

We are aware that the question of the sufficiency of these indictments as a matter of pleading is one for the exclusive determination of the lower court, and that under its decisions this Court will not re-examine that question. Accordingly, we disclaim any intention to argue that question here.

But an understanding of the nature of the challenge to the indictments is essential to a correct understanding of Judge Sullivan's opinion, so we will point out with more particularity, but briefly, the one and only ground upon which these indictments were challenged.

The fundamental challenge to these indictments is that they allege nothing *factually* enough to identify a definite offense, and allege such a variety of proposed activities *generically* as to leave this defendant* guessing and speculating as to which one of half a dozen generically-stated offenses that the Grand Jury might conceivably have intended to charge, it was charging.

If this defendant were sent to trial on these indictments, it would not know what witnesses to subpoena, nor what records, papers or documents to produce. Not until the trial would this defendant know under either indictment what charge it would have to meet.

The accusatory portion of "the price fixing" indictment (Case No. 81) generically charges (Par. 26, R. 10) that Wayne, the owner of U. S. Letters Patent on the computer

* Whenever we use the term "this defendant" or "G. & B." we mean to include G. & B.'s President, the defendant S. C. Hope.

pump (and itself a manufacturer of the computer pump) together with G. & B. and Tokheim, licensees under said patent by licenses which fixed the price at which they could manufacture and sell the computer pump, together also with Veeder (a manufacturer of computing mechanisms), were engaged "in a conspiracy to fix the price" on the patented computer pump.

The accusatory portion of "the monopoly" indictment (Case No. 82) generically charges in the first count (Par. 26, R. 9) that the same defendants were engaged in a "conspiracy to monopolize the manufacture and sale of computer pumps,"—the indictment showing, as does "the price fixing" indictment, the defendant Wayne's ownership of U. S. Letters Patent on the computer pump; and generically charges in the second count (Par. 32, R. 15) that the same defendants were engaged in a "conspiracy to monopolize the manufacture and sale of computing mechanisms"—a vital part of the computer pump.

Thus far these indictments have generically accused these defendants of doing nothing more than what this Court held that the General Electric Company (patent-owner) and the Westinghouse Company (licensee, and there were thirteen other licensees) had the right to do, in *United States* v. *General Electric Co.*, 272 U. S. 476; and the quandary of the defendants here, as to what is their supposed offense, is no less than would have been the quandary of the General Electric Company and the Westinghouse Company, if corresponding criminal indictments for "a conspiracy" to fix prices on the patented article and "a conspiracy" to monopolize the patented article had been brought against them immediately following this Court's decision in that civil suit.

It is to be noted that these indictments have already averred (Par. 14 of the "price-fixing" indictment—No. 81, R. 8—and Par. 14 of the "monopoly" indictment—No. 82,

R. 7) that the public demand for computer pumps (the patented article) was so marked that "it has been all but impossible for any gasoline pump manufacturer to continue to engage in such business unless he manufactured computer pumps," thereby recognizing the bona fide necessity of this defendant's obtaining a license under this revolutionary patent in order to remain in business, and apparently excluding the idea that the prosecution considered that there was any "sham" or "pretense" about the transactions.

Amazing as it would be for a Grand Jury (exercising its function under the Fifth Amendment) to make a charge that such licenses are unlawful *per se*, nevertheless it is conceivable that a Grand Jury *could* ignore what this Court had said was the law in *United States* v. *General Electric Co.*, 272 U. S. 476, and other cases, and *could* make such a charge. And if such charge were the *only* charge in the respective indictments this defendant would at least know in each case what the charge is, and could prepare to meet it by appropriate defense. But in neither indictment is it the only charge, because each indictment *also* charges matters which would seem to negative the idea that the Grand Jury considered the licenses to be illegal *per se*, and to establish that in the mind of the Grand Jury the "conspiracy" consisted in the doing of things other than and beyond the mere taking of licenses. Those additional charges are that the defendants were going to accomplish the undisclosed "conspiracy" by "using" the Jauch patent and by a variety of other "means," some of which are apparently lawful and some not, some of which are apparently adapted to the accomplishment of the alleged objective and some are not, *but all are factually undescribed and wholly unidentified.*

Each of these indictments, therefore, confronts this defendant with a palpable ambiguity, and puts it in the

dilemma of being unable to prepare for trial against a knowable offense.

This defendant could not safely proceed on the assumption that the charge intended to be made is that the mere taking of such a license from Wayne was unlawful *per se*, because:

First, on the theory of probability as to which of at least two conceivable offenses was the one in fact intended, it is not reasonable to suppose that a Grand Jury would make such a charge in defiance of what this Court had said is the law;

Second, the Anti-Trust Division, as a matter of public record, had impliedly admitted that such licenses were lawful, because it was recommending to Congress that they *be made* unlawful by legislation (Preliminary Report of the Temporary National Economic Committee, 76th Congress, 1st Session, Senate Document No. 95, July 17, 1939.);

Third, if the prosecution considered that such licenses were illegal *per se*, the charge (in Case No. 81) would have been for a *contract* in restraint of trade, and not for a *combination* or *conspiracy;* and,

Fourth, the subsequent allegations of each indictment make it appear that the Grand Jury must have considered that the "conspiracy," whatever it (the Grand Jury) thought it was, consisted of doing something else.

Nor could this defendant, a mere licensee, prepare a defense on the assumption of the other hypothesis, viz., that the "conspiracy" consisted in the doing of "something else," because neither indictment anywhere factually and identifiably discloses what "the something else" was claimed to be. If the presumption of innocence is indulged, as is required by law in testing the sufficiency of an indictment, how could it be said that this defendant, a mere licensee under a patent-license not taken

until 1933, has been informed as to a definite offense by an indictment which charges only that it was "in a conspiracy," alleged to have commenced in 1932, in relation to its normal day-to-day transaction of the business of manufacturing and selling computer pumps under a patent-license from Wayne, and then alleges a variety of "means," no one of which contains any identifying matter that is calculated to bring home to this defendant a transaction or an event in which it is supposed to have been implicated. It could only be by prejudging that this defendant is guilty that one could suppose that this defendant has been informed of anything by the "means" paragraph of these indictments.

These indictments are, therefore, anomalies and, we believe, without a parallel in the reported cases of criminal proceedings in the Federal Courts. For that reason they defy logical analysis. But we confidently assert that a reflective reading of them from the viewpoint of a mere licensee, presumed by law to be innocent, would leave any court with the conviction that, *aside from any and every question of substantive law under the Sherman Act,* they are insufficient, wholly as a matter of pleading, to individuate or make known any definite offense so that this defendant could prepare for trial.

After all is said and done, G. & B. learns from these indictments no more than that "in the opinion" of the prosecution it is somehow engaged in a conspiracy alleged to be in violation of the Sherman Act. G. & B. is left in precisely the same uninformed situation as was the defendant in *People* v. *Green*, 368 Ill. 242, 13 N. E. (2d) 278, where the Supreme Court of Illinois sustained a demurrer on the precise ground presented by the instant demurrers, and compared the Information under the statute there involved to an indictment under the Sherman Act.

Under American principles of common justice, guar-

anteed by the Sixth Amendment, a defendant can no more be put on trial on a generic charge of having been engaged over a period of nine years in an undescribed and unidentified "conspiracy" to violate the Sherman Act than could a defendant on a generic charge of having "conspired" to commit undescribed and unidentified larceny. A conspiracy is "not a pale abstraction," and it is settled that, no matter what offense is intended to be charged, the indictment must make known what the offense is, and must individuate it. *United States* v. *Colgate & Co.*, 253 Fed. 522, 528 (Dist. Ct. E. D. Va.) (judgment affirmed 250 U. S. 300)*; *United States* v. *Cruikshank*, 92 U. S. 542, 557-9; *United States* v. *Hess*, 124 U. S. 483, 486; *Pettibone* v. *United States*, 148 U. S. 197, 202; *Miller* v. *United States*, 133 Fed. 337, 341 (C. C. A. 8th Cir.); *Etheredge* v. *United States*, 186 Fed. 434, 437 (C. C. A. 5th Cir.); *Collins* v. *United States*, 253 Fed. 609, 610 (C. C. A. 9th Circ.); *Fontana* v. *United States*, 262 Fed. 283, 286 (C. C. A. 8th Circ.); *United States* v. *Wills*, 36 F. (2d) 855, 858 (C. C. A. 3rd Circ.).

An indictment must be sufficient not only to inform a defendant that there is a charge or claim, but so distinct and specific as clearly to advise him what he has to meet, and to give him a fair and reasonable opportunity to prepare his defense. The presumption is that a defendant is innocent, and consequently that he is ignorant of the facts on which the pleader founds his charges. It is a fundamental rule that the sufficiency of an indictment must be tested on the basis of that presumption. *Fontana* v. *United States*, 262 Fed. 283, 286 (C. C. A. 8th Circ.); *Miller* v. *United States*, 133 Fed. 337, 341 (C. C. A. 8th Circ.).

The confusion in which this defendant is left by these indictments is increased because, although they make the conclusory and noninformative charge that this defendant

* This affirmance was on the ground of the insufficiency of the indictment as a matter of substance, a ground on which the District Court also rested its judgment.

was engaged "in a conspiracy," they significantly fail to allege that this defendant, a mere licensee of the patent-owner, was in agreement with anybody other than its own licensor. *United States* v. *Piowaty & Sons*, 251 Fed. 375, 377; *Asgill* v. *United States*, 60 F. (2d) 780, 784, 785 (C. C. A. 4th Cir.).

Indeed, it would appear that the draftsman of each of these indictments was so intent on presenting a test case for obtaining a judicial determination of a selected series of questions of law *in the abstract* that he completely ignored the constitutional right of these defendants to be informed factually and identifiably of a definite offense for the alleged commission of which they were to be placed on trial.

And so the challenge to these indictments being on the constitutional ground of their failure to make known what offense was intended to be charged, this defendant is able to say now, as in the District Court, there is not now, and has not been, any occasion to construe the Sherman Act. There being no controverted question of substantive law involved, it would make no difference in reaching the conclusion that these indictments are bad as a matter of criminal pleading whether any given abstract question of the substantive right of a patent-owner under the Sherman Act "is voted up or voted down,"—either way the indictments still fail to inform this defendant as to what factually recognizable offense was intended to be charged.

In the nature of things, if this defendant was left in doubt and uncertainty in January, 1941, when these indictments were returned, as to what offenses the Grand Jury intended to charge, that doubt and uncertainty—occasioned, as we contend Judge Sullivan has held, wholly by *defective pleading* and failure of the indictments to identify any definite offense which that Grand Jury intended to charge—would not be removed by any subsequent decision of this Court as to substantive but *abstract* law of the

Sherman Act, not even if this Court should now completely overrule *United States* v. *General Electric Company*. Such an overruling of the *General Electric* case, or a modification of its doctrine, would not tend to throw any light on the question here left unanswered: viz., what offense did the Grand Jury which returned these indictments in January, 1941, intend to charge? Elaboration is unnecessary to show that this question is wholly different from the *ex post facto* question that would be involved if this Court should now overrule the *General Electric* case and a Grand Jury should then return an indictment, predicated on that decision, which adequately revealed what the claimed offense was, even though it was for transactions that occurred while the doctrine of the *General Electric* case was still in force.

II.

The opinion of the District Court, read in the light of the challenge of the demurrers, fairly discloses that the insufficiency of the indictments as a matter of criminal pleading was intended by the court to be, and was, the sole ground of decision.

It appears reasonably certain that the District Court adopted the exact challenge of the demurrers, and that the one and only ground upon which the District Court held these indictments bad was their insufficiency as a matter of criminal pleading, from the following:

FIRST: The District Court prefaced its opinion with the statement (R. 33):

> "The demurrers challenge the sufficiency of the indictments on the ground that *they fail to describe the alleged conspiracies and combinations* with which defendants are charged so as to inform them of the nature and cause of the accusations against them and enable them to properly prepare their defenses.

"The cases are before me now for disposition *on these demurrers.*" (Italics supplied.)

From this precise statement by the Court of the issue before it, the inference is strong that the intention of the Court was to decide the cases on the basis of that issue alone.

SECOND: At the threshold of its consideration of the issue, the District Court rejected the possibility that the indictments might be interpreted as intending to charge that licenses under the Jauch patent, which fixed the licensees' selling price of the patented computer pump, were unlawful *per se*, in view of the settled law to the contrary as declared in the decisions reviewed in the opinion, and conducted its study of the indictments on the theory that the offenses intended to be charged must be taken to have consisted in the doing of something else.

THIRD: In its search for definite and particular allegations of fact which would serve "to inform the defendants of the nature and cause of the accusations against them," the District Court examines the allegations seriatim, and, regardless of whether the Court makes the observation that any given, generically alleged, activity is lawful or unlawful, it takes occasion at least ten separate times to point out that the difficulty with the indictments is their failure to set out "identifying facts." For example, in disposing of the Government's contentions (a) that "competing patents" are involved, and (b) that "not one but many patents," were used, etc., the opinion states (R. 41):

> "The Government in its argument insists that competing patents are here involved, and that a monopoly of competing patents was acquired by some of the defendants in furtherance of the plan to carry out the conspiracy, but the indictments *set out no facts* whereby to *identify* these competing patents, *nor in what manner nor by whom such monopoly in them was acquired.* The Government also insists that not one but many patents on computer pumps, computing mecha-

nisms and improvements thereon were used to achieve the illegal purpose or conspiracy, but again the indictments *are silent* as to the *identity* of the other patents aside from the Jauch patent issued in November, 1932." (Italics supplied.)

The remaining instances in which the District Judge observes a similar lack of identifying matter are summarized below:

(1) With respect to the first clause set forth in paragraph 27, he says (R. 37), "What is meant by the phrase 'used the Jauch patent' is not quite clear." (2) He then says (R. 37) that if the defendants "did more than enter into ordinary patent license agreements," etc.; or "if the Government claims" that what the defendants did was something more than the exercise of a patent monopoly, "then such offense should be set out clearly in the indictments." (3) In contrasting the lack of averment of these indictments with the facts established in *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20—the *Bath Tub* case—the Court says (R. 37): "In fact there is no allegation that there was any understanding or agreement among the defendants at all, aside from the allegation that they 'knowingly have entered into and engaged in a combination and conspiracy to fix and maintain noncompetitive prices and to monopolize the manufacture and sale of computer pumps and computing mechanisms, by the doing of the things set out.'" (4) Then, in considering the Government's argument regarding the similarity of the *Bath Tub* case, he says (R. 38): "The difficulty is that the Government fails to set out any identifying facts," etc. (5) He then says (R. 38) that "it is not clear what is meant by the allegation that defendants attempted to compel Neptune to submit all patents owned or controlled by it on computer pumps and computing mechanisms 'to uses determined by Wayne.'" (6) Then, in discussing the vague charge that the defendant Wayne, "with the consent of G. & B. and

Tokheim," was attempting to induce gasoline pump manufacturers to accept licenses under the Jauch patent, the Court says (R. 39) that if the defendants made use of "unlawful means, then those facts should be set out in the indictments." (7) Then, in discussing the vague allegation regarding the licensees' acknowledging the validity of the Jauch patent, the Court says (R. 40): "If any unlawful means were used in securing this acknowledgment, then the indictments should set them out clearly enough for defendants to meet these charges." (8) In discussing the generic charge that the defendants were going to determine the resale prices of jobbers, he clearly recognizes that the fixing of resale prices on any article is unlawful, and then says (R. 40): "However, *no facts are set out* to show that the Wayne computer pumps were sold through jobbers, nor are the names of any specific jobbers given with whom these defendants carried on negotiations wherein the resale price of computer pumps was determined." Continuing the discussion of this abstract question of fixing resale prices, he again says (R. 41): "If this condition does exist, surely the Government must be in possession of the facts, and they should be set out in the indictments, so as to reasonably inform defendants of the offense with which they are charged." (9) Again, after observing that "tying clauses" are prohibited, he repeats the theme (R. 41) "but no facts are set out in the present indictments which charge defendants with the creation of a monopoly by means of 'tying clauses.'" (10) Again, in considering the possibility that the claimed offense consisted in going outside the domain of the Jauch patent, the Court says (R. 42): "no factual allegations are set out in the indictments to show that they did this." (Italics supplied.)

FOURTH: And finally the District Court shows conclusively that, aside from all questions of substantive law, it is condemning each of these indictments *as a whole* on the ground of its insufficiency as a matter of criminal

pleading under the requirements of the Sixth Amendment, by concluding its opinion as follows (R. 42):

> "It is fundamental that in every indictment the defendant is entitled to be informed with such definiteness and certainty of the accusations against him as will enable him to make his defense, and avail himself of acquittal or conviction in any further prosecution for the same offense. Having in mind that the subject matter of *the instant indictments* is protected by a patent, *I am of the opinion that the defendants here have not been furnished with such definite and particular allegations of fact as will meet this test. The charges are much too general.* They do not *adequately* describe the nature of the alleged unlawful conspiracy agreements or arrangements which defendants are accused of having made, nor show *how* the defendants became parties thereto, nor *how* they collaborated in doing the unlawful things; nor set out any unlawful means whereby the unlawful objectives were accomplished.
>
> "Believing as I do, for the reasons heretofore stated, that the indictments are insufficient, the demurrers thereto will be sustained." (Italics supplied.)

A fair reading of the last clause of the above-quoted sentence commencing "They do not adequately describe," etc., obviously requires that the meaning conveyed by the word "adequately" in the first clause of the sentence is to be carried forward to the last clause. That is so because, it will be observed, the one theme which the opinion has been following has been the failure "adequately" to charge or set forth an offense. The District Court could not have meant that the indictments fail to set out any unlawful means, generically alleged, because in the opinion the District Court has previously observed that at least three of the "means," generically alleged and considered as abstract propositions, are unlawful.

A fair reading of the opinion requires, for the same rea-

son, that whenever Judge Sullivan uses the expression "charge" or "set out," he means "adequately" charge or set out, so as to comply with the requirements of the Sixth Amendment.

The following additional considerations confirm our interpretation of the District Court's opinion:

The District Court's opinion expressly recognizes that Wayne's Jauch patent did not clothe it with any franchise to violate the Sherman Act, and that Wayne and its licensees *could* have been charged with having been engaged in the unlawful conspiracies and activities generically charged and alleged, as evidenced by the following:

> "As owner of the patent the Wayne Company had the right to grant these licenses on its own terms and conditions, * * * *provided only that in so doing it did not violate any other law.*" (R. 34)
>
> "While ownership of the patent gives to the patentee a complete monopoly within the field of his patent, *it of course does not give him any license to violate the provisions of the Sherman Act or of any other law.* Under his monopoly he may not use his patent as a pretext for fixing prices on an unpatented article of commerce; nor fix the resale price on his patented article; nor make use of 'tying clauses.'" (R. 37)
>
> "If the defendants did more than enter into ordinary patent license agreements, under the terms of which the Wayne Pump Company, as owner of the patent, licensed the others to manufacture computer pumps, and fixed the prices at which the pumps should be sold; *or if the Government claims that these defendants were involved in some offense under the Sherman Act other than the exercise of a patent monopoly,* then such offense should be set out clearly in the indictments." (R. 37) (Italics in foregoing quotations supplied.)

Although the Court enumerated three specific possible activities as being unlawful, it is evident that he did not

intend these to be exclusive, and that he recognized as being unlawful anything not falling within the accepted rights and incidents of the patent grant, as affirmatively declared in the decisions of this Court cited and quoted from in his opinion.

It must be kept in mind that the indictments which the District Court is dealing with in its opinion are not to be treated as if each contained one and only one *conceivable* charge, as, for example, that the granting and taking of a license fixing the prices of the licensee is unlawful *per se*. It is to be remembered as to each of these indictments that the District Court is engaged in trying to determine what definite offense, out of various conceivable offenses which the Grand Jury might have intended to charge, it was charging.

In its inquiry resulting in the conclusion that no offense is definitely and identifiably charged, it is apparent from the opinion that the Court is not holding that any particular charge, if made, would not constitute an offense under the Sherman Act, but is only holding that the Court is unable to determine from either indictment what charge under the Sherman Act was intended to be made. In quoting from this Court's opinions in the *General Electric* case, and other cases, the District Court is doing so only for the purpose of showing the reason for the Court's final conclusion that the indictment is "much too general" and that it does not "adequately describe the nature of the alleged unlawful conspiracy agreements or arrangements which defendants are accused of having made," etc. (R. 42).

Whenever persons are indicted in respect to the doing of something as to which they have a franchise, a license or a right to do *at least something*, and the indictment itself, as here, reveals the existence of such franchise, etc., they will necessarily be left in doubt as to what is their supposed offense, *if the indictment charges just as if there were no franchise, license or right whatsoever.*

The inherent idea will be clearly seen if we suppose an indictment for "a conspiracy," brought against Dr. William Smith (shown by the indictment to be a licensed surgeon) and certain named internes and registered nurses of a hospital, as "co-conspirators,"—the supposed "conspiracy" being for the doing of something (anything) which, as here, obviously relates to the conduct of the defendants' profession or business under such special right or franchise. The indictment then proceeds to say that it was a part of said "conspiracy" that the conspirators were going to "use" a sharp knife and were going to do other things, all of which are left undescribed and unidentified. The indictment does not even allege that they were going to "misuse" the knife, and obviously there is no revealing or identifying information residing in the conclusory charge that the defendants were engaged in "a conspiracy."*

Such an indictment would necessarily leave the defendants in doubt as to *what* offense they were charged with. The prosecuting officer might well be a reformer and have the idea that all cutting of a human being, even by a licensed surgeon, is unlawful. Under such an indictment the claimed offense might well be, and for aught that the indictment discloses, nothing more than an ordinary surgical operation in a hospital. And if a judge, in sustaining a demurrer to that indictment on the ground of uncertainty, had first taken notice of the recognized functions of a licensed surgeon and then said "having in mind that the principal alleged conspirator is a licensed surgeon, this indictment is much too general," he would no more be deciding the boundary line, dividing what is lawful or what is

* In this hypothetical indictment against a licensed surgeon and his assistants we have made no attempt to work out the details of the charge. Our purpose is only to illustrate the one idea how the defendants would, as a practical matter, be left in uncertainty as to what offense was intended to be charged against them if the indictment on its face disclosed the existence of a special right or franchise which, under existing law, would render the transaction lawful, and yet the indictment charges precisely as if there were no right or franchise whatsoever, and therefore fails to disclose what the claimed offense is.

unlawful for a surgeon to do, than has Judge Sullivan decided the lawful boundary line of patents under the Sherman Act when, in finally concluding that the instant indictments are insufficient, he said (R. 42):

> "Having in mind that the subject matter of the instant indictments is protected by a patent, I am of the opinion that the defendants here have not been furnished with such definite and particular allegations of fact as will meet this test."

In neither the hypothetical accusation against the licensed surgeon, nor in the instant case, has the presiding judge made any decision as to the extent or scope of the right; he has only recognized the existence of a right of some kind, and "having *that* in mind" has decided that the indictment is insufficient because it is so general and indefinite that it fails to make known how it is claimed that the right (whatever its scope) has been exceeded, so as thereby to disclose a definite and identifiable offense.

III.

The presentation in the Government's brief of what was before the District Court and what it decided is inaccurate and misleading.

The brief for the Government not only discusses the question of "offenses" of a patent-owner under the Sherman Act *as if* such offenses had been adequately alleged so that this defendant could know what offenses it had been charged with, but actually as if it had been proven that this defendant was implicated in such offenses. Throughout their brief (*e. g.*, pp. 7, 9, 10, 16, 17, 24, 28, 32-33, 34, 40, 42, 45, 49 and 51) Government counsel represent the matter as if the indictments had alleged that the defendants had "agreed *among* themselves" or had entered into "mutual agreements" to do sundry things, all

of which are undescribed and factually unidentified, and all calculated to prejudice the defendants and to produce the impression that the defendants would therefore know what they had "agreed" to do; whereas the fact is that the indictments nowhere allege that the defendants "agreed" to do any of the supposed things,—much less do they give any particulars whatsoever, such as time, place or circumstances, which if given would at least serve to give the theory of the prosecution. In this regard, the draftsman of the indictments contented himself with the generic and wholly uninforming charge that the defendants "were engaged in a conspiracy," just as if he (the draftsman) had never heard of the requirements for a criminal indictment under the Sixth Amendment.

In order to bolster up their factually insufficient charges of conspiracy against *this* defendant Goverment counsel resort (pp. 24 and 47) to an alleged "overt" act of another defendant, in disregard of settled law that "overt acts" are no part of the conspiracy, and cannot be resorted to in order to identify or complete the conspiracy charge. In their attempt to have it appear here that these cases are not to be distinguished from *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20 (*Bath Tub* case), except as these cases are "more extreme," they make incomplete and therefore misleading statements (pp. 26 and 41) as to the reasons given by Judge Sullivan for his conclusion that the *Bath Tub* case had not been *pleaded* here. There is not only an absence of averments in the indictments that would suggest that another *Bath Tub* case was intended to be pleaded, but affirmative averments are in these indictments that would seem to indicate the intention of the pleader to make out a case involving a different question.

Contrary to Judge Sullivan's interpretation of the charge in "the price fixing" indictment as to who it was that was going to fix the prices of the licensees, and in disregard of this Court's decisions that the lower court's interpretation

is conclusive of what an indictment charges, Government counsel contend here (p. 49) that the indictment charges that prices were going to be fixed by "joint action" of some of the defendants. The allegation in the indictment is by no means clear, but Judge Sullivan's interpretation of it is that Wayne (the patent-owner and itself a manufacturer of computer pumps) was to fix the prices of the licensees (R. 37).

Government counsel do not hesitate to go outside the record (pp. 25 and 31), but, nevertheless, they present an erroneous impression as to what arguments were before Judge Sullivan and therefore as to what his decision on those arguments was. In their STATEMENT AS TO JURISDICTION, and in support of their contention that his decision was based on a construction of the Sherman Act, they say: "This interpretation of the opinion is supported by the fact that *all* of the decisions relied upon by the Court to reach its conclusion relate to the scope of the Sherman Act and the patent law." That statement is palpably incorrect because Judge Sullivan cited and quoted at length (R. 40) from *United States* v. *Colgate & Co.*, 253 Fed. 522 in support of his conclusion (R. 41): "If this condition does exist, surely the Government must be in possession of the facts, and they should be set out in the indictments, so as to reasonably inform defendants of the offense with which they are charged." Furthermore, candor would have precluded any Government counsel, who attended the two-day argument before Judge Sullivan and knew the vast array of pleading cases cited in the Briefs and at the oral argument, from attempting to produce the impression here that no "pleading" cases were before Judge Sullivan. There was such an array of cases as to the requirements of a criminal indictment that it would have been altogether inordinate for him to cite them, or do more than cover that question by saying (R. 42):

"It is fundamental that in every indictment the de-

fendant is entitled to be informed with such definiteness and certainty of the accusations against him as will enable him to make his defense, and avail himself of acquittal or conviction in any further prosecution for the same offense."

Conclusion.

Every indictment brought by the Federal Government is necessarily brought under a Federal statute. If such an indictment is challenged by a demurrer on the ground that although the charge is recognizable, it does not constitute an offense, then of course a decision sustaining such a demurrer would be based on a construction of the statute, and an appeal would obviously lie to this Court.

But if a Federal indictment is challenged on the ground, as here, that the allegations are so general and uncertain that the defendants are not able to tell *what* offense was intended to be charged, then we respectfully submit that if the lower court adopts such challenge and sustains the demurrer and, in conducting its inquiry as to what offense, if any, can be recognized, takes notice of the doctrines theretofore pronounced by this Court for the purpose of laying aside or rejecting one of the conceivable offenses, as not being the one intended to be charged, its decision is not based on a construction of the statute, and no appeal lies to this Court. As hereinabove stated, a court can presume that a Grand Jury would not intentionally bring a charge in defiance of what this Court has said is the law, and in acting on such presumption for the purpose of rejecting such charge, when the charge intended by the Grand Jury might well be something else, a court is not making any construction of the statute under which the indictment is brought.

Again, we respectfully suggest that the question as to whether or not an indictment is sufficient reasonably to inform a defendant as to what he is charged with is

a practical one. A court should properly view the indictment through the eyes, and from the standpoint of, the accused. In so viewing the indictment, the court will realize that the accused in attempting, through his counsel, to determine what offense he has to meet, must necessarily give some consideration to what this Court has said is lawful for the accused to do. If then the court can see that the accused is necessarily left in honest doubt, because (a) upon one conjecture as to the charge of the indictment, it is a charge that recognizes no right whatsoever and seems to be charging nothing more than what this Court had held to be lawful, and (b) upon the other conjecture as to the charge of the indictment, the court can find no factual matter to identify an offense, and if for such reasons the court finds the indictment bad as a whole, its decision is not based on a construction of the statute. If that be not so, it is difficult to imagine how a demurrer could ever be sustained to a Federal indictment merely as a matter of pleading and without a construction of the statute under which the indictment was brought. An appeal would lie to this Court whenever a demurrer is sustained to a Federal indictment, which of course would be contrary to the spirit and intent of the Criminal Appeals Act, as construed by this Court.

For the reasons stated hereinabove and in the statement of appellees in opposition to jurisdiction, we submit that these appeals should be dismissed.

Respectfully submitted,

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Counsel for Appellees, Gilbert and Barker Manufacturing Company and S. C. Hope.

6-4

SUPREME COURT OF THE UNITED STATES.

Nos. 81 and 82.—October Term, 1942.

The United States of America, Appellant, 81 vs. The Wayne Pump Company, Gilbert and Barker Manufacturing Company, Tokheim Oil Tank and Pump Company, et al.	On Appeal from the District Court of the United States for the Northern District of Illinois.
The United States of America, Appellant, 82 vs. The Wayne Pump Company, Gilbert and Barker Manufacturing Company, Tokheim Oil Tank and Pump Company, et al.	On Appeal from the District Court of the United States for the Northern District of Illinois.

[December 7, 1942.]

Mr. Justice Reed delivered the opinion of the Court.

These are companion appeals from orders sustaining demurrers to indictments for violations of the Sherman Act. The indictment in No. 81 charges the defendants, manufacturers of gasoline pumps, a manufacturer of gasoline computing mechanisms and a gasoline pump manufacturing association, and certain of their officers, with conspiracy extending from 1932 to the date of the indictment, January 31, 1941, to fix the prices of computer pumps in interstate trade and commerce, in violation of Section 1 of the Sherman Act. Computer pumps are gasoline pumps embodying a mechanism which calculates, measures, displays and records the quantities and prices of gasoline passing through the pumps to the purchasers. In No. 82 the defendants are the same except that the association and its officer are omitted. This latter indictment varies from the former in that in two counts it charges a conspiracy to monopolize the manufacture and sale of computer pumps and computing mechanisms in violation of Section 2 of the Sherman Act.[1]

[1] Section 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or

The facts alleged to support the charge in the count for price fixing and those to support the count for monopolizing are substantially the same. The counts vary only as to the purposes alleged. The same means allegedly are employed to carry out each conspiracy. As similar legal issues arise in each case and as our conclusions upon each count are based upon the same reasoning, it is not necessary to make further differentiations between the counts. One opinion was handed down by the district court. It sets out the indictments quite fully. *United States* v. *Wayne Pump Company*, 44 F. Supp. 949.

As our decision does not and cannot in our view consider the correctness of a trial court's judgment that an indictment failed properly to allege the facts establishing a crime (*United States* v. *Sanges*, 144 U. S. 310; *United States* v. *Burroughs*, 289 U. S. 159) we do not set out the allegations of these counts in extenso. This has been done in *United States* v. *Wayne Pump Company, supra.* We shall state here for convenience in getting a focus on the problem only that the counts of the indictments charged conspiracies among the defendants to fix prices on and monopolize the interstate trade in computer pumps and computing mechanisms by a scheme for using patent rights and licenses to manufacture under them.

The defendants demurred to the indictments as insufficient in law to state an offense. It was said in the demurrers that the indictments failed to describe or particularize the offense attempted to be charged with sufficient definiteness, certainty or specificity to inform the defendants of the nature and causes of the accusations or to enable them to plead an acquittal or conviction thereunder in bar of other proceedings.

The trial court sustained the demurrers to each count from which ruling appeals to this Court were prayed under the Criminal Appeals Act, 34 Stat. 1246. That statute authorizes an appeal to

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conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor; and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 50 Stat. 693, 15 U. S. C. § 1.

Section 2: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 26 Stat. 209, 15 U. S. C. § 2.

this Court "from a decision or judgment quashing, setting aside, or sustaining a demurrer to any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded."[2] We have no jurisdiction if the judgment below is not so based. *United States* v. *Hastings*, 296 U. S. 188; *United States* v. *Halsey, Stuart & Co.*, 296 U. S. 451; *United States* v. *Borden Co.*, 308 U. S. 188.

In their statement opposing jurisdiction appellees contended that the demurrers were sustained because of the insufficiency of the indictments as pleadings, as distinguished from a construction of the statute upon which the indictments were based and therefore questioned our jurisdiction under the Act. We postponed decision of this question to the argument on the merits and we now come to its decision.

There is disagreement between the parties as to whether the district court sustained the demurrers on the ground of the deficiency of the pleadings as well as upon a construction of the statute. The language of the opinion makes it apparent to us that the district court's conclusion was at least in part bottomed upon the indefiniteness, uncertainty and lack of specificity of the indictments. In the opinion it is said, 44 F. Supp. 949, 956:

"There is no charge that defendants fixed the prices of gasoline pumps generally, or restricted their manufacture and sale. They are charged only with fixing the prices of computer pumps, a right which the Wayne Pump Company already had under the statutory monopoly granted by the Government when its patent was issued. What is meant by the phrase 'used the Jauch patent' is not quite clear. If the defendants did more than enter into ordinary patent license agreements, under the terms of which the Wayne Pump Company, as owner of the patent, licensed the others to manufacture computer pumps, and fixed the prices at which the pumps should be sold; or if the Government claims that these defendants were involved in some offense under the Sherman Act other than the exercise of a patent monopoly, then such offense should be set out clearly in the indictments."

[2] As amended on May 9, 1942, the Act further provides: "An appeal may be taken by and on behalf of the United States from the district courts to a circuit court of appeals or the United States Court of Appeals for the District of Columbia, as the case may be, in all criminal cases, in the following instances, to wit: From a decision or judgment quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this Act." 56 Stat. 271, 18 U. S. C. § 682.

The court further said, *Id.*, 956:

"How they took joint action or entered into joint agreements to use the Jauch patent to achieve the alleged illegal objectives, or how they went outside the monopoly granted to the patentee and its licensees, is nowhere set out in the indictments."

The lower court in *United States* v. *Colgate & Co.* 253 F. 522, affirmed 250 U. S. 300, had criticized an indictment because of failure to set out facts against any set of wholesalers or retailers alleged to have acted in combination with the defendants. In this case, commenting upon what is said to be a similar situation, the district court said, *Id.*, 958:

"So in the case at bar, if these conditions exist, the Government should have no difficulty in setting forth at least one specific instance of where defendants determined the resale price at which jobbers might resell computer pumps. If this condition does exist, surely the Government must be in possession of the facts, and they should be set out in the indictments, so as to reasonably inform defendants of the offense with which they are charged." The opinion added, *Id.*, 958:

"The Government in its argument insists that competing patents are here involved, and that a monopoly of competing patents was acquired by some of the defendants in furtherance of the plan to carry out the conspiracy, but the indictments set out no facts whereby to identify these competing patents, nor in what manner nor by whom such monopoly in them was acquired."

Finally the trial court concluded, *Id.*, 959:

"It is fundamental that in every indictment the defendant is entitled to be informed with such definiteness and certainty of the accusations against him as will enable him to make his defense, and avail himself of acquittal or conviction in any further prosecution for the same offense. Having in mind that the subject matter of the instant indictments is protected by a patent, I am of the opinion that the defendants here have not been furnished with such definite and particular allegations of fact as will meet this test. The charges are much too general. They do not adequately describe the nature of the alleged unlawful conspiracy agreements or arrangements which defendants are accused of having made, nor show how the defendants became parties thereto, nor how they collaborated in doing the unlawful things; nor set out any unlawful means whereby the unlawful objectives were accomplished."

Further, the district court, in our opinion, made it altogether clear that it was not determining solely the limits of a patent

monopoly. It pointed out that a patentee might license (*Id.*, 954) as it chose, provided only that in so doing it did not violate any other law. The Sherman Act was in mind. The court said, *Id.*, 956:

"While ownership of the patent gives to the patentee a complete monopoly within the field of his patent, it of course does not give him any license to violate the provisions of the Sherman Act or of any other law. Under his monopoly he may not use his patent as a prextext for fixing prices on an unpatented article of commerce; nor fix the resale price on his patented article; nor make use of 'tying clauses.'"

The government of course recognizes that the opinion manifests the district court's view that the indictment failed to allege violations of the Sherman Act with sufficient definiteness and particularity. But the government urges that such a ruling arose from the district court's error in holding on the merits that the facts set out in the indictment do not charge, as a matter of substance, crimes within the meaning of the Sherman Act. It is the government's contention that after making this fundamental ruling, the district court "then simply went on to say that the indictments are defective as pleadings if they are intended to charge crimes within the Sherman Act as that Act is construed by the court below."

We do not read the district court's opinion in that way. Where a court interprets a criminal statute so as to exclude certain acts and transactions from its reach, it would of necessity also hold expressly or impliedly, as the government suggests, that the indictment considered merely as a pleading was defective. Yet, the essence of the ruling would be based upon a construction of the statute. We accept as correct, for the purposes of this discussion only, the government's understanding of the opinion as holding that the allegations of the indictment, considered in substance and apart from required specificity, did not allege violations of the Sherman Act. It was a statutory construction such as that just stated which led this Court to accept jurisdiction under the Criminal Appeals Act in *United States* v. *Hastings*, 296 U. S. 188, 195.

In the light of the opinion, however, we conclude that the judgment upholding the demurrer was based also on grounds independent of the construction of the statute involved. The demurrers upon which the ruling below was based show on their face, as

appears from the typical example below, that they were aimed not at the coverage of the Sherman Act but at the form of the indictments.[3] This was the objection determined by the court. The excerpts from the opinion quoted above are conclusive, we think, that the District Court rested its ruling on the insufficiency of the pleading as an independent ground.

Since the judgment below was not placed solely upon the invalidity or construction of the statute but had an additional and independent ground, ~~as here,~~ the Criminal Appeals Act does not authorize review. *United States* v. *Hastings*, 296 U. S. 188, 193; *United States* v. *Halsey, Stuart & Co.*, 296 U. S. 451; *United States* v. *Borden Co.*, 308 U. S. 188, 193.[4] Any contrary holding would be to assume a power of review not bestowed by Congress.[5] Furthermore, at the time of the entry of the District Court judg-

[3] The formal parts are omitted:

"1. Said indictment and each count thereof, in violation of the rights guaranteed to said defendants by the Fifth and Sixth Amendments to the Constitution of the United States, fails to describe and particularize the offenses attempted to be charged therein with sufficient definiteness, certainty and specificity to inform them of the nature and cause of the accusation, to enable them to prepare and make their defense thereto, and to enable them to plead an acquittal or a conviction thereunder in bar of any other proceedings against them based on the matters or things, or any of them, on which said indictment is based.

2. The averments of said indictment, and each count thereof, purporting to charge a combination and conspiracy to monopolize the manufacture and sale of computer pumps and a combination and conspiracy to monopolize the manufacture and sale of computing mechanisms are mere conclusions.

3. Said indictment fails to make averments sufficient to identify and describe the supposed combination and conspiracy in each count of said indictment alleged, in that it does not allege with particularity any of the following:

(a) The factual basis upon which the United States relies for its charge that said combinations and conspiracies exist or have existed;

(b) The manner of formation of the supposed combinations and conspiracies;

(c) The terms of the supposed combinations and conspiracies; or

(d) The manner in and by which it is claimed that said defendants became parties to the supposed combinations or conspiracies.

4. The averments in said indictment and each count thereof with respect to the supposed combinations and conspiracies to monopolize, and the intended means for the accomplishment thereof, are so vague, indefinite, uncertain, and conclusory in character as to fail to apprise said defendants of the manner in which the prosecution claims that they have violated the law pertaining to combination or conspiracy to monopolize the manufacture and sale of computer pumps or the manufacture and sale of computing mechanisms."

[4] At one time, this Court permitted review under the Criminal Appeals Act of questions of statutory construction even where such questions were not the sole basis of the judgment. United States v. Stevenson, 215 U. S. 190, 195. This practice was disapproved. See United States v. Hastings, 296 U. S. 188, 194.

[5] United States v. Hastings, 296 U. S. 188, 192, n. 2.

ment, there was no provision for review of orders sustaining demurrers upon grounds other than those involving the construction of the basic statute.

The Criminal Appeals Act,[6] under which the government brought these cases here, now contains a provision for a remand to the circuit court of appeals if review by this Court on direct appeal is found to be unauthorized. The government does not differ with appellees' specific statement that the new provision is inapplicable to this appeal. We do not think that it is applicable. Six weeks after time to appeal had expired[7] the act was amended.[8] The amendment for the first time permits appeals to the circuit courts of appeals from orders sustaining a demurrer to an indictment in cases not directly appealable to this Court. The time to appeal to all courts remains unchanged. The amendment provides that "if an appeal shall be taken pursuant to this Act to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a circuit court of appeals . . . the Supreme Court of the United States shall remand the cause to the circuit court of appeals . . . which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance; . . ." This language directs the remand of a case in which the appeal, at the time it was taken, should have been taken to the circuit court of appeals but was instead erroneously taken to this Court. It is intended to save to the government the right of appeal which might otherwise be lost by its erroneous view as to the proper appellate tribunal.[9] At the time the instant appeals were taken there was no statutory authority for an appeal to the circuit court of appeals and therefore no room for an erroneous choice between appellate courts. Consequently, the proviso has no application. To hold otherwise would be to give a right of appeal where none

[6] Act of March 2, 1907, 34 Stat. 1246, 18 U. S. C. § 682.

[7] The orders appealed from are dated February 24, 1942. The act provides that appeals be taken within thirty days after the judgment is rendered. Petitions for appeal were allowed March 26, 1942, within the thirty day period.

[8] Act of May 9, 1942, 56 Stat. 271.

[9] In describing the effect of the bill it was said by the House Conference Managers that the act "permits appeals to the circuit courts of appeals of the United States where appeals have improperly been taken directly to the Supreme Court. . . . In other words, it permits of a correction of the appeal in cases where appeal has been taken to the wrong court." H. Rep. No. 2052, 77th Cong., 2d Sess., p. 2; see also H. Rep. No. 45, 77th Cong., 1st Sess., p. 2.

existed at the time the appeal was taken. While this might be permissible if there were such a legislative intention, the amendment is not retrospective in terms. *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 478; *Freeborn* v. *Smith*, 2 Wall. 160. Nor does it appear that Congress had the instant case in mind in enacting the amendment. *H. Rouw Co.* v. *Crivella*, 310 U. S. 612. We therefore view the right to appeal and the court to which an appeal lies as they existed at the time the appeal was taken. *Gwin* v. *United States*, 184 U. S. 669, 674.

Dismissed.

Mr. Justice JACKSON took no part in the consideration of these appeals.

Mr. Justice DOUGLAS, dissenting.

Mr. Justice BLACK, Mr. Justice MURPHY and I are of the view that the judgments should be reversed. In our opinion the District Court's rulings that the indictments were defective resulted from interpretations of the Sherman Act and the patent law which are erroneous in light of *United States* v. *Masonite Corporation*, 316 U. S. 265, and related cases.

A true copy.

Test:

Clerk, Supreme Court, U. S.